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No. 413

IN THE

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,

Petitioner,

—against—

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,

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—against—

INTERNATIONAL UNION OF ELECTRICAL, RADIO, AND MACHINE WORKERS, AFL-CIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, General Electric Company, prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit for a review of the judgment entered on May 26, 1964.

Opinions Below

The opinion and order of the United States District Court, District of Connecticut, are reported at 221 F. Supp. 6 (1963), and are printed at pages 34-50, Appendix B. The opinion of the Court of Appeals affirming the order of the District Court with a direction that the grievance here involved be submitted to arbitration, —— F. 2d ——, 56 LRRM 2289 (1964) and the dissenting opinion thereto of Chief Judge Lumbard is reported at —— F. 2d ——, 56 LRRM 2294 (1964) and is printed at pages 51-68, Appendix C.

Jurisdiction

The judgment sought to be reviewed was entered on May 26, 1964 (p. 69, Appendix D).

The statutory provision conferring jurisdiction on this Court is found at 62 Stat. 928, Title 28 U. S. C. Sec. 1254(1).

Questions Presented

I. Whether the Court should direct arbitration of a Union grievance on the issue of the Company's right, under its collective bargaining agreement, to subcontract a major construction job where

a. the exclusion of such an issue from arbitrability was evidenced by proof that after unsuccessfully seeking to obtain a contractual limitation on the Company's right to subcontract, the Union signed a collective agreement which provided that the settlement is "intended to be and shall be in full settlement of all issues which were, or which the Union, the Locals, or the Company had by law the right to make, the subject of collective bargaining in negotiations between them preceding the execution of this Agreement," and

b. the Union struck before seeking to compel arbitration and ended its strike only when confronted with an injunction proceeding brought by the National Labor Relations Board.

II. Whether the Union can, through a motion to compel arbitration collaterally attack a prior determination of the National Labor Relations Board, enforced by a Federal Court order, which rests on a finding which the Union is seeking to relitigate in the requested arbitration.

Statutes Involved

The statutes involved are those contained in Title 29, U. S. Code, Sections 158(b)(4)(A) and (D), 160(a), 160(k), 160(l), and 185(a). They are set forth in Appendix A.

Volume and page of the official edition appear in Appendix A.

Statement of the Case

A. *The Arbitration Clause and Other Pertinent Provisions in the Applicable Collective Bargaining Agreement*

On August 25, 1955, Petitioner (hereinafter sometimes referred to as the "Company" or as "General Electric") and Respondent (hereinafter sometimes referred to as the "Union") acting for itself and its GE-IUE Locals, including Local 203 (which represents the hourly employees at the Company's Bridgeport plant), at the conclusion of collective bargaining negotiations, entered into an agreement in four parts entitled "Settlement Agreement" for a term ending October 1, 1960.

The four parts consisted of:

Part One: 1955-60 Wage Agreement

Part Two: 1955-60 Pension and Insurance Agreement

Part Three: 1955-60 GE-IUE National Agreement (Relevant clauses printed at R. 37a-49a)

Part Four: General provisions (Relevant clauses printed at R. 50a-52a).

Articles XIII, XIV and XV of the National Agreement (R. 41a-47a) are the clauses setting out the grievance procedure and the availability of strikes or arbitration, after the grievance procedure has been completed.

Part Four of the 1955-60 Settlement Agreement (R. 50a), which contains general provisions applicable to all other parts of the Agreement, provides, in part:

> "1. This Settlement Agreement shall remain in effect from August 15, 1955 to October 1, 1960.
>
> "2. This Settlement Agreement, the 1955 Wage Agreement set forth in Part One hereof, the 1955 Pension and Insurance Agreement to be excuted by the parties as provided in Part Two hereof, and the 1955 GE-IUE (CIO) National Agreement set forth in Part Three hereof, *are intended to be and shall be in full settlement of all issues which were, or which the Union, the Locals or the Company had by law the right to make, the subject of collective bargaining in negotiations between them preceding the execution of this Agreement.*" (Italics ours.)

The Agreement provided for a reopener in 1958 to discuss ". . . proposals for contracting with regard to any question directly relating to employment security which may be submitted by either the Union or the Company . . ." (Article XXVIII, R. 49a). The Union did reopen the contract in 1958 and presented demands to the Company which included, among others, *a demand for a provision in the agreement limiting the Company's right to subcontract* (R. 58a-61a). *This demand was rejected by the Company and the Union acquiesced in its rejection.*

B. *Collective Bargaining History*

Since 1950, the parties to this proceeding have negotiated and entered into seven (7) collective bargaining agreements (excluding the 1963 contract recently agreed to), and over the years from time to time modified their contract language for the purpose, among others, of expressing the details of their agreement with greater clarity.

The Union repeatedly sought without success during the period between 1954 and 1960, to secure a contractual limitation on the Company's right to subcontract work.

During negotiations in 1954, the Union presented certain demands to the Company. The demands stated in part (R. 53a-55a):

> "There are four actions that your company should take immediately: . . .
>
> 1. . . .
>
> 2. *To cease the farming out of work which could be done in GE plants; . . .*" (Italics ours.)

The Company rejected this demand and no contractual limitation of that nature was included in the contract subsequently negotiated.

The Union made similar demands to restrict the Company's right to subcontract work (R. 58a-64a) and the Company rejected these demands both at the time of the 1958 reopener and again in the 1960 negotiations. The 1960 collective bargaining agreement also contained a "wrap-up" clause which stated:

> "The 1960 Agreement set forth in Part One hereof, the 1960 Pension and Insurance Agreement set forth in Part Two hereof, and the 1960 GE-IUE (AFL-CIO) National Agreement set forth in Part Three hereof, *are intended to be and shall be in full settlement of all issues which were, or which the Union, the Locals or the Company had by law the right to make, the subject of collective bargaining in negotiations between them preceding the execution of this Agreement*" (see R. 50a). (Italics ours.)

C. *Events Leading to This Proceeding*

The Petitioner, early in 1958, decided to expand the manufacturing facilities at its Bridgeport, Connecticut, plant. As part of this project, the Petitioner, on April 17, 1958, entered into a contract with The Gellatly Construction Company of Bridgeport, Connecticut, for major remodeling and reconstruction work including substantial demolition and rebuilding of facilities. This was plainly not production and maintenance work—the only work covered by the collective bargaining agreement with the Union.

On March 10, 1958, Local 203, IUE filed at Step Two of the grievance procedure under the 1955-1960 GE-IUE National Agreement, a document entitled "Grievance No. 129-58," on the subject of "Outside Contractors" (R. 19a).[1] Although called a grievance, the substance of this document stamped it unmistakably as a request for bargaining. The Union submitted in the so-called grievance the "following *proposals* to the Company." (Italics ours.)

"1. A full 40-hour week for all trades throughout the plant.

"2. All transferred and laid-off tradesmen to be recalled.

"3. Tradesmen should be recalled for first week in April.

"4. Work should be scheduled so that employees will receive the maximum amount of weeks to be worked."

---

[1] The Union raised this grievance prior to the time that the Company entered into an agreement with outside contractors. The grievance implies, however, that the Union had been informed that the Company was contemplating such action.

The grievance went on to request "review and agreement" by the Company to proposals "1" through "4" listed above.

It should be noted here that in the month of April, 1958, after receipt of the Union's grievance and before it entered into the construction contract with Gellatly Construction Company, the Company had attempted to arrange for its employees to work along with members of the Building Trades Council, representing the employees of the outside contractor (R. 21a and 22a). Gellatly advised the Company, however, that it had taken the matter up with the Building Trades Council ". . . and the answer on this question is No, and that there would be friction immediately if such a course was undertaken" (R. 20a), and this information was communicated to the Union.

After discussion of this alleged grievance at Step Three, on April 28, 1958, the Company denied the requests made by the Union in its grievance.

D. *Strike by Maintenance Employees of Local 203*

On the evening of April 28, 1958, while the "grievance" above described was still pending and prior to any written demand by the Union for arbitration, the maintenance employees of Local 203 voted to strike and pursuant to such vote, about 140 maintenance employees in the Bridgeport bargaining unit engaged in a strike and picketing of the Bridgeport Works during the period from April 29 through May 14, 1958, with the support and approval of Local 203.

E. *NLRB Proceedings*

On April 30, 1958, Petitioner, as a result of the strike, filed charges with NLRB against Local 203, IUE, and its President, Louis Santoianni, charging, *inter alia*, an attempt to compel an assignment of work to it through eco-

nomic action in violation of Section 8(b)(4)(D) of the National Labor Relations Act. Thereafter, on May 7, 1958, the Regional Director of the NLRB brought an injunction proceeding under Section 10(l) of the National Labor Relations Act as amended (R. 83a) against the Union. During the hearings on the application for an injunction the Union agreed that picketing, striking and other coercive actions would cease and not be resumed.

In July, 1958, the National Labor Relations Board issued and had served its complaint on the Union (R. 94a) charging violations of Sections 8(b)(4)(A) and (D) of the National Labor Relations Act, as amended, based on the strike action undertaken by Local 203 as above described. Thereafter on November 13, 1958 a stipulation of settlement was entered into between Local 203, IUE and Louis Santoianni, its Agent, as Respondents, and Counsel for the General Counsel (R. 105a), whereby Respondents consented to the entry of a Board order restraining further strike or concerted activities " . . . where an object thereof is to force or require the General Electric Company to assign any work to employees who are members of or represented by the Respondent labor organization rather than to employees who are members of or represented by any other labor organization . . . " (R. 108a). Such stipulation contained a proviso that it should not be deemed an admission of violation of law by Respondents, nor a waiver of its claim to the disputed work (R. 110a). On February 24, 1959, the National Labor Relations Board entered its Decision and Order, in accordance with the stipulation of settlement referred to above. This decree and order was enforced by the Circuit Court of Appeals for the Second Circuit on April 21, 1959 (R. 120a).

Decisions in the Courts Below

1. The courts below both held that petitioner had not shown a clear exclusion from arbitration of grievances challenging the company's right to subcontract a major construction job. The union's unsuccessful attempt to obtain contract restrictions on the company's right in this regard and the provisions of the wrap-up clause establishing as fully settled all issues which either were actually bargained out or which the union had the right to bargain out were mentioned in the opinions of both courts. But the operative force and import of these facts was denied recognition because of a seeming belief, at least in the Court of Appeals, that proof of exclusion must be found in the arbitration clause or not at all. (See p. 51, Appendix C.) We submit that such proof may be adduced and is entitled to its full force wherever it may be found within the four corners of the contract under consideration.

Neither of the opinions below denies that the bargaining history showed unsuccessful efforts by the union to restrict the company's right to subcontract. The Court of Appeals' opinion, however, rejects consideration of the union's attempt to achieve restrictions on the company's rights to subcontract, partly on the ground that this is a matter for the arbitrator not for the court, and partly on the ground, at least with respect to the 1958 reopener negotiations and the 1960 contract negotiations, that they postdated the contract on which the union predicates its claimed arbitration. As far as the first ground for rejecting consideration of the history is concerned, we contend that if it sheds light on the parties' intent to remove a subject from the arbitration forum it is both the duty and the responsibility of the court to weigh and evaluate it. This, we submit, is true under the rules laid down by this court in *United Steelworkers of America* v. *Warrior & Gulf Navi-*

gation Company, 363 U. S. 574 (1960). It is all the more emphasized in the case at bar by the contract provisions here expressly providing that the court shall decide questions of arbitrability (R. 46a).

The fact that some of the evidence post-dated the contract at bar did not disqualify it as having probative quality. The effort of the union, *after* the contract was signed, to obtain the very kind of provision which, by its claim to arbitration in this case, it in effect asserts was *already* in the contract is a devastating admission against the soundness of its claim and should have been given its full weight as such.

An additional reason suggested in the Court of Appeals for ignoring the bargaining history is contained in footnote 5 (p. 58, Appendix C) where it is suggested that inasmuch as resort to bargaining history may only be had where a provision is ambiguous, and inasmuch as an exclusionary clause to be effective must be clear and unambiguous, one might, the Court says, "properly question" the use of any bargaining history to show exclusion from arbitration. We believe that if the search for intent, which this Court has declared is the ultimate test of arbitrability, is aided by reference to bargaining history, references to that history should not be blocked nor consideration of it forbidden by an artificial rule of construction which would conceal intent rather than uncover it.[2]

A fundamental defect in the opinions of both Courts below is that they completely overlook the fact that their opinions would rewrite rather than interpret the labor

[2] The opinions below in this case are directly contra to the decision of the Court of Appeals for the 7th Circuit in *Independent Petroleum Workers* v. *American Oil Company, Inc.*, 324 F. 2d 903 (1963) as to which this Court has granted certiorari (No. 971, 1964).

agreement which was the result of hard-fought negotiations between the parties.

2. The District Court denied petitioner's contention that in legal effect the NLRB did make a final determination of the very question now involved in the present proceeding (p. 34, Appendix B).

Similarly, the Circuit Court attempted to answer this point by stating that the issue of the *contract* right of the bargaining unit employees to the work assigned to the independent contractor was never fought out or decided in proceedings before the Board (p. 51, Appendix C).

We contend that both the District Court and the Circuit Court are incorrect in finding that the NLRB order did not determine that *this Union* was not entitled to the disputed work pursuant to the contract between the parties.

Reasons for Granting the Writ

The decision below involves important questions of federal law applicable to labor arbitration. It places the courts in the position of rewriting labor agreements between parties which were the result of collective bargaining negotiations. It would impair the obligation of contract.

As stated by Chief Judge LUMBARD, in his dissenting opinion in this case (pp. 67-68, Appendix C):

> "Surely the parties did not agree to arbitrate every conceivable claim. But by the reasoning of the majority we are pretty close to the point of holding that every claim must be arbitrated because at the very least it involves the question whether by some process of reasoning the claim may involve tangentially some provision in the agreement. We do a grave disservice

to the salutary cause of arbitration when we compel a company to arbitrate under such circumstances. We defeat our national labor policy when we leave to management as its sole source of self-protection against arbitration of all disputes insistence upon the recital in the bargaining agreement of a multitude of matters which are not to be arbitrated, or, more likely, refusal to agree to arbitration about anything lest it unwittingly be required to arbitrate everything. With unions constantly seeking the inclusion of more matters in their written labor agreements, the majority ruling would seem to open up a one-way street for the benefit of the union. In my view, where there is no persuasive reason to believe that the parties could have thought that certain matters might in the future be the subject of arbitration under the terms of an agreement then governing their relations, we should hold that there was no agreement to arbitrate.

"It is not our proper business to rewrite a labor agreement which is the result of long and hard-fought negotiations between management and labor. It is as much our duty, after careful scrutiny of the agreement, to reject arbitration where the parties never intended it to be applicable as it is to require arbitration where the parties have seen fit to provide for this form of adjudication. The record here establishes that arbitration of disputes regarding subcontracting was never intended by the parties."

If successful in this action, unions could first go through the motions of negotiating for a particular contractual clause, and thereafter, after its rejection and the culmination of negotiations by the execution of an agreement, could successfully utilize a second forum (arbitration) to seek to achieve the contractual provision sought unsuccessfully in

negotiations. This is especially so when the parties had considered the underlying issue of subcontracting, and had resolved that the issue should be foreclosed from both collective bargaining and from arbitration during the term of 1955-1960 Agreement. The lower Court's decision would disregard that resolution.

On the question whether bargaining history may be used by the Court to interpret the intent of the parties to arbitrate or not to arbitrate a particular claim, the decision of the Court of Appeals is in conflict with the decision of the United States Court of Appeals for the 7th Circuit (*American Oil, supra*), and we submit with decisions of the United States Court of Appeals for the 9th Circuit (*Pacific Northwest Bell Telephone Company* v. *Communications Workers of America*, 310 F. 2d 244 (1962); *Independent Soap Workers* v. *Procter & Gamble Mfg. Co.*, 314 F. 2d 38 (1963), *cert. denied*, 374 U. S. 807 (1963)).

The decision would also result in a collateral attack on the National Labor Relations Board's prior determination in its Decision and Order, which order necessarily rested on a finding that the governing agreement did not entitle the employees represented by the respondent Union to the assignment of the subcontracted work. By its failure to give the Board's finding controlling effect, the court has failed to properly interpret Section 10(a) of the National Labor Relations Act, as amended.

POINT I

The decisions below impair the obligation of contract in that they require the company to arbitrate a dispute which the parties never agreed to arbitrate. They misinterpret prior decisions of this Court.

The decisions of this Court in *Atkinson* v. *Sinclair Refining Co.*, 370 U. S. 238 (1962), *Drake Bakeries, Inc.* v. *Local 50, American Bakery Workers*, 370 U. S. 254 (1962) and *Chauffeurs, Teamsters, and Helpers Local No. 795* v. *Yellow Transit Freight Lines, Inc. et al.*, 370 U. S. 711 (1962) ruled that the intention of the parties as to what matters are arbitrable still governs and that it is still the function of the courts to make an effective inquiry into the intention of the parties.

Petitioner recognizes that in the *Warrior* opinion *supra*, this Court set forth rules of construction for the interpretation of an agreement to arbitrate, stating:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a *purpose* to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and arbitration clause quite broad" (pp. 584-85). (Italics ours.)

The majority opinion of the Circuit Court maintains, however, that such "forceful evidence" can only be in the nature of a clear and unambiguous exclusionary clause to the arbitration promise itself. The majority of the Court feels that it cannot read the specific and limited language of the arbitration promise in this case in conjunction with the bargaining history on the subject of subcontracting and find a clear and unambiguous exclusion of subcontracting from arbitration.

Petitioner contends that in pursuing this narrow construction, the court is lending its support to the Union to *reform* the bargain the parties made rather than to enforce it. There can be no more forceful evidence presented than the Respondent's own words and actions in the circumstances of this case which are in effect an admission of the non-arbitrability of the Union's claim.

When the specific and limited language of the arbitration promise (R. 45a to 47a) is read in conjunction with the repeated demands made by the union for a contract provision limiting the company's right to subcontract, and with the consistent rejection of those demands by the company, there is no "*provision*" on which the arbitration clause might operate.

The fact of the matter is, the agreement contains no express provision with respect to subcontracting. The agreement, however, does provide that it is "intended to be and shall be in full settlement of all issues which were, or which the Union, the Locals, or the Company had by law the right to make, the subject of collective bargaining in negotiations between them preceding the execution of this Agreement." These words gather meaning from the context of the negotiations which preceded the execution of the agreement (see pp. 4-5, *supra*).

The Union's initial choice of the economic weapon of strike clearly demonstrates its more realistic view of the remedy available to it. It was only after this remedy failed that the Union was forced to pursue its remedy in the arbitration forum. Whether or not its strike action constitutes an election of remedies, it surely connotes the affirmative recognition by the Union of the non-availability to it of relief through the arbitration forum. It is not now the Court's duty to disregard the Union's action and to place itself in a position of aiding the Union to gain

through arbitration something which it could not gain through negotiation, or strike action.

What is omitted from the Circuit Court's analysis is the recognition that the contract contains no provision on subcontracting and that the bargaining history makes it clear that it was never the intention of the parties to arbitrate any dispute arising out of the Company's right to subcontract for plant expansion work. Therefore, there was no need to exclude the subject from arbitration by a special clause. What the "wrap-up" clause represents, in the light of the circumstances surrounding the negotiations, is a clear and unmistakable intent to foreclose any consideration of certain bargainable matters (including subcontracting) during the term of the contract, in *any* forum, including arbitration.

POINT II

The holding of the Court below that it is improper to use bargaining history as part of the interpretative process to determine the intent of the parties unless such history bears directly upon the arbitration clause, conflicts with a decision of the United States Court of Appeals for the Seventh Circuit and, we submit, with decisions of the United States Court of Appeals for the Ninth Circuit.

There can no longer be any question concerning the admissibility of extrinsic evidence to aid the Court in determining the scope of the arbitration promise. *Atkinson* v. *Sinclair Refining Co., supra,* and *Drake Bakeries, Inc., supra,* are square authority for the admissibility of such evidence.

In *Independent Petroleum Workers* v. *American Oil Company, Inc., supra,* the Court of Appeals for the 7th Circuit was presented with bargaining history as an important element in determining a Union claim that the employer violated the contract by contracting out work. Among the reasons which led the Court to its decision to deny arbitrability were its conclusions that (1) the mere allegation by the Union that the agreement there under discussion had been violated did not automatically entitle the Union to arbitration under a clause providing for arbitration of "alleged violations" of the agreement; and (2) there was no provision there (as here) purporting to restrict or regulate subcontracting, although the Union sought unsuccessfully to obtain one in past bargaining.

The following quotations from the opinion illustrate (a) how the court disposed of the claim that the mere assertion of a breach of contract is enough to compel arbitration and (b) the weight it attached to a bargaining history similar to that at bar.

" 'In other words, it is plaintiff's position that the mere allegation that the agreement has been violated *ipso facto,* entitles it to arbitration. *This position, if accepted, means that either party by alleging a refusal of the other to bargain with respect to any conceivable issue or controversy would become subject to arbitration.*

'Plaintiff's position is devoid of all logic. It is without merit and we so hold. Particularly is this so under the facts of the case where the complaint clearly demonstrates that the parties did bargain on the grievance in dispute' (324 F. 2d at 906-907). (Emphasis supplied.)

* * * * *

'The bargaining history between plaintiff and defendant relative to the right of the latter to contract out

work is much discussed in the briefs. Plaintiff urges that such history is irrelevant. We think, however, it has some significance and may properly be considered. *United Steelworkers of America* v. *American Mfg. Co.*, 363 U. S. 564 (concurring opinion, page 569, 46 LRRM 2414). *Pacific Northwest Bell Telephone Co.* v. *Communications Workers of America*, 310 F. 2d 244, 247, 51 LRRM 2405. This bargaining history is set forth in our previous decision. 275 F. 2d 706, 708, 45 LRRM 2843. *In brief, it shows that plaintiff for many years had sought the inclusion of a clause in the collective bargaining agreement specifically prohibiting or limiting the right of the defendant to contract out work. On each occasion the proposal was rejected. This bargaining history while of course not controlling fortifies the conclusion which we have reached that plaintiff's claim is without merit'*" (324 F. 2d at 907). (Emphasis supplied.)[3]

On May 18, 1964, a petition for a writ of certiorari to the Seventh Circuit in the *American Oil* case (No. 971, 1964) was granted by this Court to review the following question, *inter alia*:

> "Should the Court order arbitration of a grievance notwithstanding its belief that neither the recognition clause nor past practice limited management's right to subcontract work?"

The fact that the decision of the 7th Circuit is directly in conflict with the decision of the lower court in the case

[3] There can be no question of the similarity of the issues involved with that in the case at bar and the persuasive authority of that case here. It is to be noted, however, that although the case was discussed and quoted from at length in Petitioner's Reply Brief to the Court below, it was not referred to by the Court in its opinion, although it did attempt to distinguish other cases relied on by petitioner as authority for the use of bargaining history to determine the intent of the parties.

at bar reinforces the view that the writ should be granted here.

The Courts below sought to distinguish the decision of the Ninth Circuit in *Pacific Northwest Bell Telephone Company* v. *Communications Workers of America, supra,* from the instant situation by stating that in *Pacific* the bargaining history went to the judicial issue of arbitrability and did not deal with the merits of the dispute and therefore it was admissible evidence.

In our case, however, the evidence as to bargaining history does not deal with the merits of the dispute but relates to whether restrictions on subcontracting were rejected in the bargaining and foreclosed from further consideration during the term of the contract. Once it is established that a subject matter of this kind was so rejected and foreclosed *a fortiori,* it is not subject to the grievance procedure and not arbitrable. Therefore, any evidence as to what is or is not comprehended within the terms of the compact is necessarily evidence on the issue of arbitrability (see wrap-up clause, p. 4, *supra*).

In the *Pacific* case, the Circuit Court remanded the case to the District Court for the latter to take into account bargaining history which would show that the Union had unsuccessfully attempted to include within the reach of the arbitration clause the type of dispute there at issue. Similarly, in the case at bar, what is basically involved is the right of the Court to use bargaining history to show the underlying intention of the parties. It is no less valuable where the bargaining history relates to a separate clause in the agreement which must be read in conjunction with the grievance procedure and arbitration clause to establish the parties' basic intent.

The Ninth Circuit itself cited the *Pacific* case for the "rule that words in the *collective bargaining agreement* are to be interpreted in the background and light of bargaining

history." (See *Independent Soap Workers* v. *Procter & Gamble Mfg. Co.*, 314 F. 2d 38, 42.) (Italics ours.)

The Court below seeks to rely on this Court's failure to mention bargaining history in the *Warrior & Gulf* decision, *supra*. But as Judge Moore of the Circuit Court of Appeals for the Second Circuit stated in his dissenting opinion in *Local 12298, UMW* v. *Bridgeport Gas Co.*, 328 F. 2d 381, at 385-86 (1964):

> "As the Supreme Court has said 'arbitrability is a question for the courts.' The answer must come from the contract and the intention of the parties as disclosed therefrom and from the testimony of the parties. The many decisions cited by both parties were dependent upon the particular facts in each particular case. And so should be the situation here. Until this intention is determined these other cases allegedly authoritative cannot supply an interpretation of this agreement. Only by such procedure can the factual determination, indicated as essential by the Supreme Court in the Steelworkers cases, be satisfied."

The facts and bargaining history which we have presented here stamp by the "most forceful evidence" (*Warrior* decision at p. 585), the issue tendered by the Union as one the parties agreed never to arbitrate.

POINT III

The direction of the courts below that the dispute herein should be arbitrated constitutes an attack on a prior, valid, enforced National Labor Relations Board order that resolved the underlying issue. Such an attack is foreclosed by the statutory requirement that the National Labor Relations Board determination be given controlling effect.

The Court of Appeals rejected the Petitioner's contention that the action brought by the Union was a collateral attack on a prior, enforced order of the National Labor Relations Board.

We respectfully submit that this rejection of Petitioner's argument was erroneous.

The National Labor Relations Board proceedings herein were terminated by a written stipulation between the NLRB and the Union for entry of a cease and desist order by the Board to be enforced by a consent court decree. That Board order and that court decree, we contend, effectively passed on the very question here sought to be submitted to arbitration. If that contention is sound, obviously arbitration may not be ordered. (See Discussion on §10(a), *infra*; *NLRB* v. *Pacific American Ship Owners Association*, 218 F. 2d 913 (9th Cir. 1955), *cert. denied*, 349 U. S. 930; *Gala-Mo Arts, Inc.* v. *Laiben*, 37 LRRM 2134 (D. C. E. Mo. 1955), *enf'd* 232 F. 2d 102 (8th Cir. 1956).[4] See also *Blue*

[4] In the *Gala-Mo* case, the employer brought an action for damages against the Union and Regional Director on an alleged conspiracy to force the employer to accede to the Union's demands by filing a false, unfair labor practice charge. The Court dismissed the action and noted that, where an issue has been litigated before the Board whose decision is final and binding, the party adversely affected by such determination may not re-litigate the same issue and seek a different result.

Bird Knitwear Co. v. *Livingston*, and *Kentile, Inc.* v. *Rubber Workers*, discussed *infra.*)

A. *The Order of the Board Which Was Enforced by the Second Circuit, Determined That, Under the Collective Bargaining Agreement, This Union Was Not Entitled to the Work Contracted to Gellatly Construction Company.*

The approach of the National Labor Relations Board to work assignment disputes of the kind underlying this case was summarized by the Board in its 1959 Annual Report, page 111:

> *"Whenever it is found that an unresolved dispute within the meaning of section 10(k) exists, and that the parties have not agreed upon methods for settlement, the Board must ascertain whether the union charged with having violated section 8(b)(4)(D) has a valid claim to the disputed work.*[5] If such a claim is established, the Board issues a determination that the claiming union is entitled to compel the employer to assign the work to the employees in the established bargaining unit. Since a union may derive representation rights not only from a certification *but also from a contract*, it is the Board's practice to issue a like

[5] The legislative history of Section 10(k) discloses that Congress carefully examined the possible use of arbitration to handle jurisdictional disputes of the type here in issue, and rejected it. Thus, Section 10(k) in the Senate Bill (S. 1126) "empowered and directed" the Board either to hear or determine the dispute "or to appoint an arbitrator to hear and determine" it (Leg. History of LMRA, 1947 at p. 130). That section in S. 1126 also provides: "The award of an arbitrator shall be deemed a final order of the Board" (*Id.* at p. 131). The above quoted provisions were removed from the section by the House-Senate confrères (*Id.* at p. 561). Thereafter, Senators Morse and Murray strongly urged Congress to reinsert the deleted language (*Id.* at 1554-55, 1585), but without success. It is thus clear that far from favoring the arbitration process as an alternate method of determining jurisdictional disputes, Congress deliberately eschewed it.

determination where 'the claimant union has an immediate or derivative right under an existing contract upon which to predicate a lawful claim to the work in dispute.' *Where a union charged with a section 8(b)(4)(D) violation is found to have no valid claim to disputed work, it is the Board's practice to issue a determination to the effect that the union is not lawfully entitled to require the employer to assign the work to its members, rather than to the employer's own employees whether members of another or of no labor organization.*" (Italics ours.)[6]

The United States Supreme Court in *NLRB* v. *Radio and Television Broadcast Engineers Union (CBS)*, 364 U. S. 573 (1961)[7] (see opinions below, pp. 34, 51, Appendices B and C) instructed the National Labor Relations Board that thenceforth it must affirmatively determine who is to get the disputed work in such cases. Even before this instruction, however, it had been Board practice (as illustrated by *W. H. Condo, supra*, the instant Board order, and the 1959 annual Board report, *supra*) to determine whether

[6] See e.g. of Board general approach *W. H. Condo*, 121 NLRB 308 (1958). In that case the Union refused to abide by the Board decision finding a violation of Section 8(b)(4)(D). The Union claimed that the Board had not affirmatively determined which Union if any was entitled to the disputed work. The Board, overruling this claim, stated that although it had not decided who was to specifically get the work assignment, the effect of the prior order was to declare that *this Union* was not entitled to the disputed work. For other examples of this approach see *Newark & Essex Plastering Company*, 121 NLRB 1094 (1958); *Markwell & Hartz*, 120 NLRB 610 (1958).

[7] There the Court held that the National Labor Relations Board had not complied with Section 10(k) of the Act and its own rules in that it failed to determine expressly in the Section 10(k) proceeding which labor organization, or particular trade, craft or class of employees should be assigned the disputed work, as distinguished from the determination which the Board had theretofore been making whether a Respondent Union was or was not entitled by contract to the work it claimed.

the particular respondent Union in any case before it was entitled to the work pursuant to any Board order or certification or to any existing contract between the parties. (See *CBS*, pp. 577-78.)

From the foregoing it appears that the very making of the Board's application for preliminary injunction was in effect a representation that under controlling Board decisions the Union's claim to the work in question was not supportable under its contract with Petitioner, and the Board's General Counsel so argued in the injunction proceeding (R. 122a). The Board's order, under these circumstances, amounted to a finding that the Union was not entitled to the work in question under its contract with Petitioner. Neither the fact that it was a consent order nor the so-called savings clause incorporated in it operated to negate this conclusion.

B. *Section 10(a) of the Act Prohibits the Union's Attempt to Attack Collaterally a Valid, Court Enforced Board Order.*

Section 10(a) of the Act provides:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. *This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement*, law or otherwise." (Italics ours.)

In exercising this preventive power, the Board is authorized to enter into consent orders if it is convinced that such orders are for "the ultimate benefit of the parties and the public" (*Roselle Shoe Corp.*, 135 NLRB 472 (1962), *aff'd*, 315 F. 2d 44 (D. C. Cir. 1963)).

In light of the discussion above, section 10(a) plainly precludes the arbitration here sought. For an award in its favor would be in direct conflict with the Board's prior and controlling determination. Furthermore, the award sought by the Union would be an attempt to legitimize coercive pressures restrained by the Board's order.[8]

On April 17, 1964, the U. S. District Court for the Eastern District of New York, in *Kentile, Inc.* v. *Rubber Workers*, —— F. Supp. ——, 55 LRRM 3011, stayed arbitration on a matter because the employer had filed charges with the National Labor Relations Board.[9] The Court stated that the trial examiner of the National Labor Relations Board had found that the Union had violated the act on an issue which the Union now sought to be arbitrated. Although the National Labor Relations Board had not as yet acted, the Court stated:

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[8] See *In re McKenzie Coach Lines*, 100 F. Supp. 489, *aff'd*, 194 F. 2d 248 (1st Cir.), *rev'd on other grounds*, 344 U. S. 25 (1952). In that case Judge Wyzanski made it clear that a Board determination may only be challenged by direct review and may not be attacked in another forum. While this case was reversed on other grounds, viz: Priority of claims, by the U. S. Supreme Court, the opinion of that Court, in effect, reiterated the findings of Judge Wyzanski on the Section 10(a) point. The Court noted: "It is the Board, not the referee in bankruptcy nor the Court, that has been entrusted by Congress with authority to determine what measures will remedy the unfair labor practices" (344 U. S. at p. 30).

[9] Recently the New York State Supreme Court in *Blue Bird Knitwear Co.* v. *Livingston*, —— Misc. 2d ——, 54 LRRM 2476 (1963), granted an employer's motion for a permanent stay of arbitration because the National Labor Relations Board had ruled adversely to the Union on the very issue which was to be arbitrated. The Court stated: "If arbitration were allowed after the precise question has been ruled on by the National Labor Relations Board, the result could be contrary holdings on a single issue—a situation always to be avoided," citing *inter alia*, *Garner* v. *Teamsters Union*, 346 U. S. 485 (1953).

> "To require the plaintiff to now proceed with arbitration for the purpose of determining whether it has violated the collective bargaining agreement by refusing to discharge the replacement employees who had not become members of the union would, in the light of the four day hearing before the trial examiner and his decision, be an exercise in futility. The question to be resolved by arbitration having been fully tried and decided by the trial examiner it would be repetitious to arbitrate the very same issue."

This decision is in line with the reasoning of this Court in *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261 (1964). Although not directly passing on the question involved here, this Court stated:

> "Should the Board disagree with the arbitrator, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, *the Board's ruling would, of course, take precedence*" (p. 272). (Italics supplied.)

Smith v. *Evening News*, 371 U. S. 195 (1962) and *Carey* v. *General Electric Company*, 315 F. 2d 499, 511 (2nd Cir. 1963), *cert. denied*, 377 U. S. 908 (1964) imply the same finding. (See also Meltzer, *The Supreme Court, Congress and State Jurisdiction over Labor Relations*: II 59 Colum. L. Rev. 269, 282-84, 292-94, 299.)

Congress has in Section 10(a) made it clear that the Board's dispositions should be supreme, and has not qualified that supremacy where consent, rather than contested orders, are involved. In fact, the provisions of a consent order have as much force and effect as an order that was contested. See e.g., *NLRB* v. *Ochoa Fertilizer Corporation*, 368 U. S. 318 (1961); *NLRB* v. *Local 476, Plumbers*, 368

U. S. 401 (1962); *NLRB* v. *Las Vegas Sand & Gravel Corp.*, 368 U. S. 400 (1962); *Roselle Shoes, supra.*

A judicial imposition of such a qualification would not only ignore Congress' unqualified command but would also threaten the integrity of the Board's settlement procedures, which are of critical importance to effective administration of the total statutory scheme.

Another consideration that bears on the significance of the Union's non-waiver is the Supreme Court's settled view of the Board's role. The Court has repeatedly ruled that the "Board . . . does not exist for the 'adjudication of private rights'; it acts in a public capacity to give effect to the declared public policy of the act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining." See *Phelps Dodge Corporation* v. *NLRB*, 313 U. S. 177, 193 (1941). Thus notwithstanding the Union's attempted reservations of its contractual claims,[10] dismissal of this action is necessary to prevent the frustration of the objectives behind the Board's prior exercise of its paramount powers—the permanent settlement of the underlying work-assignment dispute.

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[10] The Union's denial of a waiver obviously did not *create* rights in the Union—it merely preserved those, if any, it already had. But as we have seen it had none in the area under discussion and the Board's order was an adjudication of this fact. The non-waiver clause obviously cannot and does not operate to deprive the order, entered on the stipulation of which it was a part, of force or meaning.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: August 19, 1963

Respectfully submitted,

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APPENDIX A

Statutes Involved

Labor Management Relations Act, 1947, Section 301(a), 61 Stat. 156, 29 U. S. C. Section 185(a):

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Labor Management Relations Act, 1947, Section 8(b)(4)(A) and (D), 61 Stat. 136, 29 U. S. C. 158(b)(4)(A) nd (D):

> "(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> • • • • •
>
> (4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
>
> (A) forcing or requiring any employer or self-employed person to join any labor or employer or-

ganization or to enter into any agreement which is prohibited by section 8(e);

* * * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * * "

Labor Management Relations Act, 1947, Section 10(a), 61 Stat. 146, 29 U. S. C. 160(a):

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith."

Statutes Involved

Labor Management Relations Act, 1947, Section 10(k), 61 Stat. 149, 29 U. S. C. 160(k):

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed."

Labor Management Relations Act, 1947, Section 10(l), 61 Stat. 149, 29 U. S. C. 160(l):

> "Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any dis-

trict where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period: Provided further, That such officer or regional attorney shall not apply for any restraining order under section 8(b)(7) if a charge against the employer under section 8(a)(2) has been filed and after the preliminary investigation, he has reasonable cause to believe that such charge is true and that a complaint should issue. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: Provided further, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal

process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil Action No. 9092

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA,

—vs.—

GENERAL ELECTRIC COMPANY.

Ruling on Cross Motions for Summary Judgment

This action is brought by the plaintiff union to compel arbitration under its 1955 Settlement Agreement with the defendant of a dispute provoked by the company's decision to hire the Gellatly Construction Company, of Bridgeport, Connecticut, to relocate the manufacturing facilities of General Electric's Automatic Blanket and Fan Department within the area of its plant at Bridgeport. This project involved the purchase and installation of new equipment and machinery, the moving of machinery, and the remodeling and reconstruction of certain buildings.

The plaintiff is an unincorporated labor organization and the defendant is engaged in an industry affecting commerce. Federal jurisdiction is based on §301 of the Labor Management Relations Act of 1947, 29 U. S. C. §185.

Local 203, a labor organization, affiliated with the plaintiff was a party to the 1955 Settlement Agreement and was certified as the bargaining representative for the unit covering "All production and maintenance employees of the Gen-

eral Electric Company Construction Materials Department and Appliance and Merchandise Department—plant located at Bridgeport, Connecticut."

The original grievance was lodged by Local 203 at Step Two of the grievance procedure on March 19, 1958 in protest against the company's plan to hire outside contractors with employees in a different union to perform the above described work, much of which was normally performed by employees within the union's bargaining unit. After the grievance had been pursued through Step Three, the final stage of the grievance procedure preliminary to arbitration, and the work had begun with Gellatly using its employees, about 140 maintenance employees who were members of the Local went out on strike. The vote to strike was taken on the night of April 28th, and the strike was begun on April 29, 1958. It ended May 14, 1958 following an N.L.R.B. investigation of the strike pursuant to a company complaint of an unfair labor practice and petition for an injunction instituted in the District Court by the Regional Director. During the strike, the International Union had made written demand upon the company for arbitration pursuant to Article XV of the General Electric—International Union National Agreement, and requested the American Arbitration Association to arrange for it. After the defendant had advised the Association of its position that the ". . . grievance desired to be arbitrated does not, in its opinion, raise an arbitrable issue . . .",[1] thus forestalling action by the Association through the effect of Article XV 2(b) of the Agreement, this litigation was begun. The union brought suit in the Superior Court for Fairfield County, Connecticut, on June 30, 1958, to compel the company to arbitrate.

[1] The defendant's position is that because a dispute is "grievable" it does not necessarily follow that it is arbitrable.

Rulings on Cross Motions for Summary Judgment

Following a decision of the Supreme Court of Connecticut, *International Union* v. *General Electric Co.*, 148 Conn. 693, 174 A. 2d 298 (1961), reversing and remanding the case to the Superior Court which had held that the union's amended application (complaint) failed to state a cause of action, the defendant removed the matter to this court, where the plaintiff's motion to remand was denied by Judge Timbers.

Since this is a case in which original jurisdiction could have been founded in this court, the parties have agreed that no appeal will be taken upon the ground of any jurisdictional defect based upon the removal. Also, sufficient facts have been agreed upon between the parties by stipulation and at pre-trial conferences to permit disposition of the case on their cross motions for summary judgment.

The employer defends on three grounds:

(1) That contracting out does not constitute an arbitrable dispute under the collective bargaining agreement.

(2) That the merits have already been decided adversely to the union by the N.L.R.B.

(3) That, having elected to strike, the union is now estopped from seeking arbitration.

ARBITRABILITY.

Article XV of the Agreement provides that:

"Any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article XIII, [Grievance Procedure] and which involves either, (a) the interpretation or application of a provision of this Agreement, . . . shall be submitted to arbitration. . . ."

Rulings on Cross Motions for Summary Judgment

In several cases recently decided by the Supreme Court and our own Court of Appeals, the special rules for the interpretation of arbitration provisions in collective bargaining agreements have been clearly defined. Since this is not the first case in which the scope of the arbitration provisions in the 1955 Agreement has been considered, the task of applying those rules to this case has been substantially lightened. The case of *Carey* v. *General Electric Co.*, 213 F. Supp. 276 (S. D. N. Y. 1962) aff'd as to questions material here, —— F. 2d ——, March 11, 1963, Oct. Term, Docket No. 222, determined the scope of the very same provisions in the contract which are at issue here. Reference to Judge Palmieri's excellent and thorough analysis of the applicable Supreme Court cases, *Textile Workers Union* v. *Lincoln Mills of Alabama*, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957); *United Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960); *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 575, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); and *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960), followed by Judge Kaufman's penetrating review and scholarly exposition of the rationale of the cases in this area of law, serve to eliminate all doubt as to whether the subject matter of this dispute is arbitrable.

One of the grievances in *Carey, supra*, (labeled National Docket Nos. 4606-4611 consolidated as a single grievance), involved assignment of work normally performed by maintenance plumbers, employees within the union's bargaining unit, to employees in a different unit represented by a different union. This grievance was held to be arbitrable despite the defendant's contention that it was not within the arbitration clause. Whether described as "as-

signment of work to a different union" or as "contracting out", discernment yields no basis for distinguishing the nature of the grievance in these two cases. *Carey* v. *General Electric, supra,* pp. 292-3. Square support for a determination that a contracting out dispute is arbitrable is also found in the first of the now famous steelworkers trilogy, *Steelworkers* v. *Warrior, supra,* p. 585, where the Supreme Court held:

> "The grievance alleged that the contracting out was a violation of the collective bargaining agreement. There was, therefore, a dispute 'as to the *meaning* and *application* of the provisions of this Agreement' which the parties agreed would be settled by arbitration.
>
> "The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not the courts." (Emphasis added.)

Although the attempt to distinguish "meaning and application of the provisions", in *Warrior,* from "interpretation or application of any provision", in this Agreement, could be brushed aside on its face, it may be said to have been accorded the courtesy of a judicial rejection by *Procter & Gamble Ind. U.* v. *Procter & Gamble Mfg. Co.,* 298 F. 2d 644 (2 Cir. 1962), where Judge Bartel's order (195 F. Supp. 134, E. D. N. Y. 1961) to compel arbitration of a grievance described as " . . . contracting out work normally performed by the union's bargaining unit . . . " was upheld on the basis of an arbitration clause worded like the one here. Following the teaching of *Warrior,* the opin-

ion of the Court of Appeals by Judge Medina pointed out in *Procter & Gamble Ind. U.* v. *Procter & Gamble Mfg. Co.*, *supra*, pp. 645-6:

> "The nub of the matter is that under the broad and comprehensive standard labor arbitration clause every grievance is arbitrable, unless the provisions of the collective bargaining agreement concerning grievances and arbitration contain some clear and unambiguous clause of exclusion, or there is some other term of the agreement that indicates beyond peradventure of doubt that a grievance concerning a particular matter is not intended to be covered by the grievance and arbitration procedure set out in the agreement."

There is no doubt that the arbitration provisions of Article XV are broad enough to apply to the plaintiff's grievance in this case.

BARGAINING HISTORY

Apparently, on the theory that in *Carey* the Court did not have the bargaining history before it in interpreting the arbitration provision in the 1955 Agreement the Company now stresses the argument that the so-called "wrap up" clause (Article XXVII, Issues of General Application), if interpreted in the light of the collective bargaining history, which it claims would reveal a succession of unsuccessful attempts by the union to secure a prohibition on the Company's right to farm out work, removes this dispute from the jurisdiction of the arbiter. The clause pointed to provides:

> "This Agreement . . . between the parties [is] intended to be and shall be in full settlement of all issues which were the subject of collective bargaining be[illegible]en

> the parties in national level collective bargaining negotiations in 1955. Consequently, it is agreed that none of such issues shall be subject to collective bargaining during the term of this Agreement and there shall be no strike or lockout in connection with any such issue or issues; . . ."

Bargaining history of much the same character was before the Supreme Court in *Warrior*, as is made clear by Justice Wittaker's dissent, p. 588, yet the opinion of the Court gave it no significance. *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Co.*, 283 F. 2d 93 (3 Cir. 1960); *IAM* v. *International Aircraft Services, Inc.*, 302 F. 2d 808 (4 Cir. 1962). The bargaining history in *Warrior* was directed to a management's prerogatives clause which the employer claimed removed certain "matters which are strictly a function of management" from the jurisdiction of the arbitrator, rather than to a "wrap up" clause such as is present here, which, on its face, purports only to foreclose issues which "were the subject of collective bargaining between the parties" from being reconsidered by "*collective bargaining* during the term of this Agreement". (emphasis added), and not to restrict the *arbitrator's* jurisdiction as in *Warrior*. Where the prior collective bargaining history deals with merits of the dispute rather than its arbitrability, see *Pacific Northwest Bell Tel. Co.* v. *Communications Workers of America*, 310 F. 2d 244 (9 Cir. 1962); *United Electrical, Radio & Machine Workers* v. *General Electric Co.*, 208 F. Supp. 870 (S. D. N. Y. 1962), "the company's argument is a perfectly permissible one to make, but it certainly, by the directions which the Supreme Court has given, is one with which the arbitrator must labor and not the judge." *Association of*

Westinghouse Salaried Employees v. *Westinghouse Electric Co., supra,* p. 95; *IAM* v. *International Aircraft Services, Inc., supra; United Steelworkers* v. *General Electric,* 211 F. Supp. 562 (N. D. Ohio E. D. 1962); but see *Local No. 725* v. *Standard Oil,* 186 F. Supp. 895 (D. N. D. 1960); *Local 12298 U. M. W.* v. *Bridgeport Gas* (D. Conn. Feb. 6, 1963) Civil #9281, unreported decision of Judge Timbers.

EFFECT OF PROCEEDINGS BEFORE N. L. R. B.

The grievance protesting against the company's assignment of work, which was claimed by the Local to be work normally done by construction and maintenance employees within the bargaining unit it comprised, to outside contractors having been processed through Step Two without satisfactory settlement, was referred by Local 203 to the plaintiff International Union for Step Three discussions at the headquarters level in New York City, in accordance with Article XIII 2(c) of the Agreement. The Step Three grievance meeting was held on April 28, 1958. That evening, the Local voted to strike when about 140 maintenance employees, 65 of whom were then either out of work or downgraded, began to strike and picket the Bridgeport Works and on the next day, the defendant reacted by filing charges with the N. L. R. B. against the Local and International which accused them of violating §§8(b)(4)(A) and (D) of the National Labor Relations Act, 29 U. S. C. §158. Thereafter, the Regional Director's action for an injunction against the strikers was settled upon a written stipulation for entry of a cease and desist order by the Board and to a consent decree to enforce it. The stipulation provides:

"8. This Stipulation contains the entire agreement between the parties, there being no agreement of any

kind, verbal, or otherwise, which varies, alters, or adds to it. The execution and signing of this Stipulation by the Respondents does not constitute an admission that the Respondents have violated any provision of the Act, nor does it constitute a waiver by the Respondents of their claims that the employees represented by Respondent labor organization were entitled to perform the disputed work described in the Notice of Charge Filed and Notice of Hearing pursuant to Section 10(k) and in the consolidated Complaint, and that the Company's assignment of such disputed work constituted a breach of the existing collective bargaining agreement heretofore made by and between the International Union of Electrical, Radio and Machine Workers, AFL-CIO and the Company."

The defendant was neither a party to the injunction proceedings instituted in the District Court nor to the decree of the Court of Appeals enforcing the Board's cease and desist order; nor was it a party to the settlement stipulation.

Having thus retraced the steps leading to the order of the Board and the judgment enforcing it found in documents themselves to ascertain what was actually decided by the Board, *The Evergreens* v. *Nunan*, 141 F. 2d 927 (2 Cir. 1944), cert. denied 323 U. S. 720, 65 S. Ct. 49, 89 L. Ed. 579 (1944), it is abundantly clear that the question whether, under the terms of the collective agreement, the plaintiff was entitled to the work was never fought out nor decided. On the contrary, both of the actual parties to the proceeding and to its settlement, well aware of the fact that the question of contracting out might be of some importance in future litigation, took the appropriate safeguard of

specifically excluding it from those issues which were settled. Whether or not a Board determination in 8(b)(4)(D) cases of the union's contractual right to the work for which it struck to the extent that it may be required by *N. L. R. B.* v. *Radio & Television Broadcasting Engineers Union*, 364 U. S. 573, 81 S. Ct. 330, 5 L. Ed. 2d 302 (1961), would operate as a bar to arbitration of the union's claim to the work under its collective bargaining contract, see *Carey* v. *General Electric, supra*, clearly there can be no such bar where the Board stopped far short of making any such determination with respect to the subject matter of the dispute which the union seeks to arbitrate.[2]

"A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of law not litigated in the first action. This is true even though both actions involve the same subject matter." Restatement, Judgment (1942) 70, Comment c.; see *United States* v. *Moser*, 266 U. S. 236, 244, 45 S. Ct. 66, 69 L. Ed. 262 (1924). Here, the point of the merit of the union's claim to the work under the contract was not presented, not litigated, and not determined in the injunction proceeding or elsewhere.

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[2] The parties properly agree that the jurisdiction of this court is unaffected by the existence of N. L. R. B. jurisdiction over the all ged unfair labor practices committed by the Local. Neither primary nor priority of jurisdiction is here relevant, since the Board has already acted to the extent it deemed necessary. Neither the company nor the union contends that the Board's jurisdiction over the claims of §§8(b)(4)(A) and (D) unfair labor practices operates to pre-empt this court from exercising its §301 jurisdiction, *Carey* v. *General Electric, supra;* but see *Carey* v. *Westinghouse Electric*, 11 N. Y. 2d 452, 184 N. E. 2d 298 (1962) cert. granted 10 L. Ed. 2d, No. 1, April 22, 1963, p. 10, and the present rule in this circuit is clearly that the court is not, thereby, deprived of its jurisdiction.

"Estoppel by judgment includes matters in a second proceeding which were actually presented and determined in an earlier suit. See *Commissioner* v. *Sunnen, supra,* at 598 [333 U. S. 591 (1949)]. A judgment entered with the consent of the parties may involve a determination of questions of fact and law by the court. But unless a showing is made that that was the case, the judgment has no greater dignity, so far as collateral estoppel is concerned, than any judgment entered only as a compromise of the parties." *United States* v. *International Building Co.*, 345 U. S. 502, 73 S. Ct. 807, 97 L. Ed. 1182 (1953).

The recent decision of the Supreme Court in *Labor Board* v. *Ochoa Fertilizer Corp.*, 368 U. S. 318, 82 S. Ct. 344, 7 L. Ed. 2d 312 (1961), does not compel a different result. That decision merely requires the Court of Appeals to enforce consent decrees as drawn, regardless of whether the Board heard any evidence or had anything before it other than the stipulation. This order of the Board, and that of the Court enforcing it, merely requires the union to cease and desist from striking or picketing "where an object thereof is to force or required the General Electric Company to assign any work to employees who are members of or are represented by the respondent labor organization rather than to employees who are members of or are represented by any other labor organization." In so enjoining the union pursuant to a stipulation which expressly reserved the latter's right to pursue its claims under the contract, the Board did not tread upon the terrain here reserved for the arbitrator. The decree cannot be stretched to include what was expressly excluded by the stipulation.

THE NO-STRIKE CLAUSE.

Finally, there remains for consideration the significance to be attached to the strike. The defendant has made use of the fact of the strike by members of Local 203 as the base for a miscellany of contentions:

(1) A contract breach upon which the right to arbitrate was conditioned;

(2) A waiver or repudiation of its right to arbitration; and

(3) An election of remedies.

Every one of these would, if valid, preclude determination by arbitration of the contracting out dispute on the merits.

(1) Although not expressly passed upon there, the decision in *Carey* should be sufficient to dispose of the company's contention that the relatively restricted no-strike clause in this contract somehow renders this dispute non-arbitrable. See also *United Steelworkers* v. *General Electric*, 211 F. Supp. 562 (N. D. Ohio E. D. 1962). The Supreme Court has recently had occasion to comment on the relation between the no-strike and arbitration clauses in a collective bargaining contract. Speaking through Justice White, *Drake Bakeries* v. *Bakery Workers*, 370 U. S. 254, 261, no. 7 (1962), it said:

> "We do not understand the opinions in *Textile Workers Union* v. *Lincoln Mills*, 353 U. S. 448, 455, or *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564, 567, to enunciate a flat and general rule that these two clauses are properly to be regarded as exact counter-weights in every industrial setting, or to justify either party to the contract in wrenching

them from their context in the collective agreement on the ground that they are mutually dependent covenants which are severable from the other promises between the parties."

There is "no such inflexible rule rigidly linking no-strike and arbitration clauses of every collective bargaining agreement in every situation." *Drake, supra,* p. 261.

The agreement between the parties provides in Article XIV only that:

> "There shall be no strike . . . in connection with any matter subject to the grievance procedure, . . . unless and until all of the respective provisions of the successive steps of the grievance procedure . . . shall have been complied with . . . or if the matter is submitted to arbitration. . . ."

An examination of the arbitration clause, however, discloses nothing in its language which in any way conditions arbitration upon the absence of a strike. The only matters excluded from arbitration are particularly specified in Article XV 3(b):

> "It is specifically agreed that no arbitrator shall have the authority to establish or modify any wage, salary or piece rate, or job classification, or authority to decide the appropriate classification of any employee. Subject to the foregoing limitations on the authority of an arbitrator, nothing in this subsection (b) shall prevent arbitration of a grievance involving a violation of this Agreement."

This wording in the Agreement, reveals, as clearly as that in the collective bargaining agreement before the Court in

Drake, p. 262, that "by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes." And, in this case, no less than in *Drake*, "They have thus cut the ground from under the arguments that an alleged strike, automatically and regardless of the circumstances, is such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise." p. 262. In this case, the strike was not a breach of a condition upon the right to arbitration of the dispute.

(2) While the parties agreed that the Step Three discussion of the grievance procedure had been held on April 28, 1958 before the vote to strike was taken, they were unwilling to agree that the company, at the time of that discussion, authoritatively expressed its decision to deny the grievance. However, on April 29, 1958, the day the strike commenced, the respondent did deny the petitioner's grievance in writing. This completed the grievance process. The dispute had not yet been submitted to arbitration.

In *Drake*, the union's contention that its own breach of the contract by a strike should not operate to deprive it of the right to arbitration of that self-same breach was upheld. Although this case arises differently, the company takes the same position regarding the effect of the strike upon its obligation to arbitrate. The Supreme Court in *Drake*, p. 261, rejected the employer's argument that:

> " . . . the union's violation of the no-strike clause is *sui generis* and so basic to what the employer bargained for in the contract and so inherently and 'fundamentally inconsistent with' the grievance and arbitration procedures that the faithful observance

of the no-strike clause by the union is a condition precedent to the employer's duty to arbitrate (even though he has promised to do so), or that the union must be deemed to have waived, or to be estopped from asserting, its right to arbitrate."

Although damages are not sought here[3], the evidence bearing on the alleged strike need not be ignored in considering whether the strike, in addition to, or in lieu of a claim for damages, should also have the effect of barring the right to arbitration provided in the contract. To the extent that the strike is asserted to constitute a repudiation of the contract, its nature should be taken into consideration. See *Drake Bakeries* v. *Bakery Workers, supra,* pp. 262-3, no. 19. The circumstances in this case make it at least debatable that the strike was a breach of the contract by the union, but even if this was a breach, or whether the strike be labeled as waiver or repudiation, it was insufficient to excuse the company from its contractual obligation to arbitrate. See *Armstrong-Norwalk Rubber Co.* v. *Local No. 283,* 167 F. Supp. 817 (D. Conn. 1958) App. dismissed 269 F. 2d 618.

(3) It is even less permissible to regard the strike as a choice of remedy. With rare perspicacity, Judge Palmieri foresaw what was bound to happen if arbitration was denied. He warned in *Carey,* p. 293, "Moreover, denial of arbitration would have the paradoxical result of forcing the Union to engage in conduct prohibited by 8(b)(4)(D)

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[3] There is an ample remedy available to the company in case it should decide to press its claim for alleged breach of the no-strike clause by the Local. *Drake Bakeries* v. *Bakery Workers, supra; Teamsters Local* v. *Lucas Flour Co.,* 369 U. S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1961).

as the only means of obtaining adjudication of its claim to this work." See also *Carey*, ... F. 2d ..... (2 Cir. 1963). It would indeed be a strange kind of remedy, the invocation of which would entail as a consequence the prosecution of persons pursuing it.

Since the strike was not an appropriate method of obtaining relief, it could not act as a bar, e.g. *Samasko* v. *Davis*, 135 Conn. 377, 64 A. 2d 682 (1949); Cf. Restatements, Judgments, §65, Comment i, 1942, with Restatements, Contracts, §383, 1932. Sight should not be lost of the fact that it was the *company*, not the union, that brought the matter before the N. L. R. B. The efforts of the company to force the petitioner to submit its claim to a tribunal chosen by the defendant can hardly be regarded as a choice made by the petitioner or as a basis for a claim by the defendant that it relied upon the petitioner's choice of the N. L. R. B. as the forum to decide disputes which they had contracted should be decided by arbitrators. Even if the Local's strike should be construed as pursuit of a remedy, it was one that must necessarily have been unavailing. That would not prevent resort later to an appropriate remedy. *Henry* v. *Harrington*, 193 N. Y. 218, 86 N. E. 29 (1908). This was not a case of election between inconsistent rights. Election between substantive rights, e.g. to ratify or disavow a contract made by an agent without authority, is to be distinguished from election between judicial remedies. 3 Williston on Contracts, §683, rev'd 1936.

The petitioner is not barred from seeking an order in this court to compel the union to submit the grievance to arbitrators.

The substantive federal law of collective bargaining agreements which the *Lincoln Mills* decision, 353 U. S. 456, 457, required the judiciary to develop from the provisions

and policies of the National Labor Relations Act, general legal principles and other appropriate sources has already reached the stage where it is unnecessary to restate the reasons of policy which underlie the special rules of interpretation to be used in determining the scope of an arbitration clause in such agreements. Those reasons of policy apply with no less force to the determination of the effect of the kind of special defenses to the enforcement of such an arbitration clause which were interposed here in an attempt to prevent the submission of this dispute to arbitrators.

Defendant's motion for summary judgment is denied.

Plaintiff's motion for summary judgment is granted.

Defendant company must submit aforesaid grievance to arbitration.

So Ordered.

Dated at Hartford, Connecticut, this 13th day of May, 1963.

M. Joseph Blumenfeld
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 253—September Term, 1963.

(Argued January 27, 1964 Decided May 26, 1964.)

Docket No. 28364

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Appellee,

—v.—

GENERAL ELECTRIC COMPANY,

Appellant.

Before:

LUMBARD, *Chief Judge,*
WATERMAN and MARSHALL, *Circuit Judges.*

Appeal from a decision of the United States District Court for the District of Connecticut, Blumenfeld, *J.*, granting summary judgment for plaintiff union and ordering defendant company to arbitrate a grievance dispute.

Affirmed.

BAKER & DIAMOND, Stamford, Conn. (Bertram Diamond, of counsel); Benjamin C. Sigal, Washington, D. C., *for Appellee.*

NORDLINGER, RIEGELMAN, BENETAR & CHARNEY (David L. Benetar, Thomas F. Hilbert, Jr., H. H. Nordlinger, Martin Zeiger, of counsel), New York City, *for Appellant.*

Opinion by Waterman, U.S.C.J.

WATERMAN, *Circuit Judge:*

This is an appeal from a decision of the United States District Court for the District of Connecticut, determining that a labor dispute is arbitrable. Plaintiff, International Union of Electrical, Radio and Machine Workers, AFL-CIO, originally brought suit against defendant, General Electric Company, in the Suprior Court for Fairfield County, Connecticut, in June of 1958, to compel the company to arbitrate a grievance which had arisen under its collective bargaining agreement with the union. The Connecticut Superior Court ruled in favor of the company and dismissed the union's complaint on the ground that the complaint failed to state a cause of action; but upon appeal the Supreme Court of Connecticut reversed and remanded, *International Union* v. *General Electric Co.*, 148 Conn. 693, 174 A. 2d 298 (1961). Thereupon the company removed the case to the U. S. District Court below, where suit could have originally been brought, Labor Management Relations Act, §301(a), 29 U. S. C. §185(a), and there, after a denial of the union's motion to remand to the state court, the parties agreed that no appeal would be taken upon the ground of any alleged jurisdictional defect based upon the removal. After the relevant facts had been stipulated, the district court then granted the union's motion for summary judgment and ordered that the grievance be submitted to arbitration despite the following objections of the company: (1) that the grievance did not constitute an arbitrable dispute under the collective bargaining agreement; (2) that prior related action by the National Labor Relations Board had foreclosed submission of the dispute to an arbitrator; and (3) that, after the company's refusal to arbitrate, a strike which had been called by a plant local of the union, Local No. 203, precluded the union from thereafter seeking arbitration.

We affirm the granting of the motion for summary judgment.

The grievance at issue arose when the company decided to make use of an independent construction firm in relocating, within its plant at Bridgeport, the manufacturing facilities of its Automatic Blanket and Fan Department. This project involved the purchase and installation of new equipment and machinery, the moving of machinery, and the remodeling of certain buildings. The union claims that this decision to subcontract by the company gave rise to an arbitrable question of whether in so doing the company violated the union recognition, job description, and seniority provisions of its 1955-1960 collective bargaining agreement with the union.[1] Article XV of that agreement, the basic arbitration provision, provides that "any grievance which remains unsettled after having been fully processed pursuant to the provisions of Article XIII [describing the grievance procedure], and which involves either, (a) the interpretation or application of a provision of this Agreement, . . . shall be submitted to arbitration . . ." Another part of Article XV excludes from the province of an arbitrator certain types of questions not relevant here.

This grievance has been fully processed as per Article XIII of the bargaining agreement; and it is clear that Article XV, on its face, is sufficiently broad to require arbitration. Article XV, the standard type of arbitration clause

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[1] The 1955-1960 collective bargaining agreement was in the form of a "Settlement Agreement" comprised of four parts: (1) 1955-1960 Wage Agreement; (2) 1955-1960 Pension and Insurance Agreement; (3) 1955-1960 GE-IUE National Agreement; (4) General Provisions. The 1955-1960 GE-IUE National Agreement was the basic labor contract which the parties executed, and, for the sake of convenience, references to the parties' bargaining agreement in this opinion will, unless otherwise indicated, refer to the National Agreement.

used in most bargaining agreements providing for the arbitral process, states that "any" grievance which remains unsettled after preliminary processing shall be submitted to arbitration if it involves the "interpretation or application of a provision of this Agreement." By lodging this grievance against the company's subcontracting of this work—a type of grievance which, incidentally, we have had occasion to label a "garden variety" grievance, *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co.*, 298 F. 2d 644, 645 (2 Cir. 1962)—the union certainly called into question the proper interpretation to be accorded several provisions of this collective bargaining agreement. Indeed, in a previous case involving the same parties and this same contract, this court held arbitrable a grievance involving the quite similar question of the company's right to assign certain work to regular company employees outside the bargaining unit. *Carey* v. *General Electric Co.*, 315 F. 2d 499, 505 (2 Cir. 1963), *cert. denied*, —— U. S. ——, 84 S. Ct. 1162 (1964).

It is the company's position, however, that even though the union's subcontracting grievance may be *prima facie* within the coverage of the arbitration clause, the parties nevertheless agreed in their bargaining contract to exclude subcontracting questions from submission to arbitration. Of course, one who undertakes to foreclose arbitration by employing this line of argument assumes a heavy burden, for, as the Supreme Court said in the now famous case of *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 584-85, 80 S. Ct. 1347, 1354 (1960), where parties to a collective bargaining agreement have provided for the arbitration of grievances, then "in the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a pur-

pose to exclude the claim from arbitration can prevail, particularly where . . . the exclusion clause is vague and the arbitration clause quite broad." This court has framed the rule in the following terms: "The nub of the matter is that under the broad and comprehensive standard labor arbitration clause every grievance is arbitrable, unless the provisions of the collective bargaining agreement concerning grievances and arbitration contain some clear and unambiguous clause of exclusion, or there is some other term of the agreement that indicates beyond peradventure of doubt that a grievance concerning a particular matter is not intended to be covered by the grievance and arbitration procedure set forth in the agreement." *Procter & Gamble Independent Union* v. *Procter & Gamble Mfg. Co., supra,* at 645-46.

What is therefore remarkable about the company's position in the present case is that the company, far from pointing to an exclusionary clause which clearly and unambiguously removes certain grievances from the jurisdiction of the arbitrator, urges us to find the grievance at issue not arbitrable by utilizing a contractual provision which does not even purport to be an exclusionary clause in the light of bargaining history. The contractual provision relied upon is one found in the 1955-1960 "Settlement Agreement," of which the 1955-1960 "National Agreement," the basic collective bargaining agreement already alluded to, is a part. The provision is no more than the customary "wrap-up" clause which is inserted at the end of most bargaining agreements, and it provides, in relevant part, as follows:

> "1. This Settlement Agreement shall remain in effect from August 15, 1955 to October 1, 1960.

"2. This Settlement Agreement, the 1955 Wage Agreement set forth in Part One hereof, the 1955 Pension and Insurance Agreement to be executed by the parties as provided in Part Two hereof, and the 1955 GE-IUE (CIO) National Agreement set forth in Part Three hereof, are intended to be and shall be in full settlement of all issues which were, or which the Union, the Locals or the Company had by law the right to make, the subject of collective bargaining in negotiations between them preceding the execution of this Agreement."

Noting that the union tried several times unsuccessfully to insert into the 1955-1960 agreement contractual limitations on subcontracting, once in preliminary negotiations in 1954 and again during negotiations for a limited reopening of the agreement in 1958,[2] the company urges upon us what is, essentially, the following argument: (1) The arbitration clause covers only grievances involving the interpretation or application of "a provision" of the agreement; (2) the above bargaining history and the "wrap-up" clause indicate that no "provision" of the 1955-1960 contract restricts the right of the company to subcontract; (3) therefore, the arbitration clause does not cover subcontracting since there is no substantive provision of the contract upon which it can operate.

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[2] Whatever the weight to be accorded bargaining history in the case at bar, we cannot consider what transpired during the 1958 negotiations, for those negotiations were conducted after the refusal of the company to arbitrate the grievance, and even after the union had commenced this suit in the Connecticut courts to compel arbitration. For the same reason we also reject as not constituting forceful evidence of an agreement to exclude the grievance from arbitration the bargaining history of negotiations conducted in 1960 for a new contract.

No claim could be further from a claim based upon a reliance upon a clear and unambiguous clause excluding subcontracting from arbitration than this claim which the company here advances. What the company has done, under the guise of labeling a wrap-up clause as some sort of exclusionary clause, is to attempt to persuade us to decide that the grievance is not arbitrable because the grievance is groundless inasmuch as no substantive provision of the collective bargaining agreement, according to the company, forbids or restricts subcontracting. But whether a certain brand of company conduct is prohibited by a provision of a collective bargaining agreement will always be the ultimate question which the grievance itself will present; and whether this company and union ever agreed to permit unrestricted subcontracting of work, an issue upon which the presence or absence of a wrap-up clause would seem to have little if any bearing,[3] is the very question which the arbitrator will have to decide. For us to yield to the urgings of the company and decide it ourselves would be to ignore the admonition contained in the *Warrior & Gulf* case that courts should not become "entangled in the construction of the substantive provisions of a labor agreement." 363 U. S. at 585, 80 S. Ct. at 1354.

The impropriety of using the bargaining history which has been cited to us to declare this grievance non-arbitrable is not lessened by the company's reminder that "arbitration

[3] The wrap-up clause does no more than express the fact that the collective bargaining contract was intended to represent the complete agreement of the parties. It is difficult to see how the weight to be accorded the absence in the agreement of a clause which the union tried to secure should be changed by this formal statement of what would otherwise be assumed. Thus, the argument which the company here makes against arbitrability is the same one which would be made if there were no wrap-up clause in the contract which could be seized upon and called an exclusionary clause.

is a matter of contract and a party cannot be required to submit to arbitration any dispute he has not agreed so to submit."[4] Assuming that the bargaining history behind an arbitration or exclusion clause can legitimately be used to determine the scope of the contractual promise to arbitrate,[5] the bargaining history in this case is not helpful in clarifying the meaning of the words used in any such clause. It is not designed to show that the parties, in drawing up their arbitration clause, intended to limit the promise to arbitrate to certain classes of disputes; nor is it designed to show that the parties, in agreeing to an exclusionary clause, meant to withhold from an arbitrator certain types of questions. Rather, its only purpose is to show that, since the union tried unsuccessfully to incorporate into the bargaining agreement a substantive provision restricting the type of work which the company could subcontract, none of the substantive provisions upon which the union has grounded the grievance here involved prohibit subcontracting. In short, while this bargaining history may prove very useful to an arbitrator in examining this grievance to deter-

[4] All too often those who rely on this statement from *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, *supra*, at 582, 80 S. Ct. 1347, 1353, urge at the same time that the rules of construction set forth in that opinion for interpreting an agreement to arbitrate be disregarded.

[5] Since bargaining history would appear to be a proper device for interpreting a contractual provision only when that provision is ambiguous or otherwise unclear, and since an exclusionary clause to be effective must be clear and unambiguous, one might properly question the use of any bargaining history to indicate that a clause in a bargaining contract has been designed to exclude a certain type of grievance from arbitration. See also the discussion in this opinion, *infra*, of the treatment accorded bargaining history by the majority in the *Warrior & Gulf* case and by this court in *Local 12298, District 50, United Mine Workers* v. *Bridgeport Gas Co.*, 328 F. 2d 381 (2 Cir. 1964).

mine whether the company has violated any provision of the contract by its subcontracting of work, it is of no legitimate use to a court in deciding whether to order the company to submit the grievance to an arbitrator. See *Association of Westinghouse Salaried Employees* v. *Westinghouse Electric Corp.*, 283 F. 2d 93 (3 Cir. 1960).

Neither of the two Ninth Circuit cases the company relies upon in its brief constitutes authority for the broad use of bargaining history which the company would have us undertake.[6] In *Pacific Northwest Bell Tel. Co.* v. *Communications Workers*, 310 F. 2d 244 (9 Cir. 1962), the court, though remanding the case to the district court for that court to take into consideration the bargaining history which showed that the union had unsuccessfully attempted to include within reach of the arbitration clause the type of dispute there at issue, indicated that bargaining history touching upon the merits of a grievance could not be considered, and expressly rejected the type of bargaining history argument urged by the company here. 310 F. 2d at 248. And in *Independent Soap Workers* v. *Procter & Gamble Mfg. Co.*, 314 F. 2d 38 (9 Cir.), *cert. denied*, 374 U. S. 807, 83 S. Ct. 1696 (1963), the court merely looked at the bargaining history of the arbitration clause itself, in the form of assurances by the employer that certain words in the clause would not be used to block arbitration, in order to resolve a procedural arbitration problem in favor of the arbitrability of a grievance. Moreover, our unwillingness to use bargaining history to foreclose arbitration of this dispute is greatly

[6] We intimate no opinion as to the view expressed in those cases that some types of bargaining history may be used in resolving questions of arbitrability. Compare with the Ninth Circuit cases discussed above. *International Union of Electrical Workers* v. *Westinghouse Electric Corp.*, 32 U. S. L. Week 2533 (U. S. D. C. S. D. N. Y., Mar. 24, 1964).

reinforced by the fact that, as is apparent from accompanying concurring and dissenting opinions, the majority in *Warrior & Gulf*, faced with having to determine whether an exclusionary clause prevented arbitration of a subcontracting grievance, refused to even mention bargaining history that showed repeated unsuccessful attempts by the union to secure contractual restrictions on subcontracting. See also *Local 12298, District 50, United Mine Workers* v. *Bridegport Gas Co.*, 328 F. 2d 381 (2 Cir. 1964) and the treatment there of bargaining history as brought out in the dissenting opinion at 328 F. 2d 385-86.

II

We deal now with the company's argument that arbitration of this grievance should not be ordered because of related strike action engaged in by a local of the union, Local 203, prior to the institution of this court proceeding, and because of certain official action which the National Labor Relations Board took, also prior to the institution of this proceeding, as a result of that strike. On April 28, 1958, resolution of the grievance having failed at the local level, the union and the company met on the headquarters level in New York City to discuss the matter. This meeting represented the final step in the grievance procedure prior to arbitration. At the meeting, authorized company spokesmen informed union representatives that the company denied that the subcontracting violated any provision of the bargaining agreement, and on the following day, April 29, the company gave the union the same answer to its grievance in written form. That same day about 140 maintenance employees in the union's Bridgeport bargaining unit engaged in a strike and picketed the company's Bridgeport plant in accordance with a strike vote which had been taken

by the maintenance employees the night before. The strike, which had the support and approval of the union's Local 203 and which was never disavowed by the international union, was to last through May 14.

In response to the strike, the company, on April 30, filed charges with the National Labor Relations Board accusing Local 203, its president, and the international union of having violated Sections 8(b)(4)(A) and (D) of the National Labor Relations Act, 29 U. S. C. §§158(b)(4)(A) and (D). The Board's Regional Director, acting pursuant to Section 10(l) of the Act, then filed a petition for an injunction against Local 203 and its president in the United States District Court for the District of Connecticut, but after hearings on the petition had been held the case was continued without entry of a final order because of assurances by the respondents that the strike and the picketing would be discontinued. At the same time the Board and the respondents entered into a written stipulation providing for the issuance of a cease and desist order by the Board and a consent order to enforce it, and included in their stipulation the following paragraph:

> "(8) This Stipulation contains the entire agreement between the parties, there being no agreement of any kind, verbal, or otherwise, which varies, alters, or adds to it. The execution and signing of this Stipulation by the Respondents does not constitute an admission that the Respondents have violated any provision of the Act, nor does it constitute a waiver by the Respondents of their claims that the employees represented by Respondent labor organization were entitled to perform the disputed work described in the Notice of Charge Filed and Notice of Hearing pursuant to Section 10(k) and in the consolidated Complaint, and that

the Company's assignment of such disputed work constituted a breach of the existing collective bargaining agreement heretofore made by and between the International Union of Electrical, Radio and Machine Workers, AFL-CIO and the Company."

The company's contention that this strike foreclosed arbitration of the grievance is wholly without merit.[7] Article XIV of the bargaining agreement provides only that "there shall be no strike . . . in connection with any matter subject to the grievance procedure . . . unless and until all of the respective provisions of the successive steps of the grievance procedure . . . shall have been complied with . . . or if the matter is submitted to arbitration." The bargaining agreement in no way expressly conditions the availability of arbitration upon there having been no strike over the grievance, and no such condition may be legitimately read into the agreement. *Drake Bakeries* v. *Local 50, American Bakery & Confectionery Workers*, 370 U. S. 254, 82 S. Ct. 1346 (1962). Thus, whether the strike was or was not a breach of the parties' collective bargaining agreement, and there is more than a little doubt that it was, we cannot accept the company's contention that the union, by choosing to strike, effected an election of remedies which now

[7] The company contended below that the strike barred arbitration on the grounds that the union by having engaged in the strike (1) had breached the bargaining contract; (2) had waived or repudiated its right to arbitration of this grievance; and (3) had made an election of remedies which barred it from seeking arbitration. The trial court properly rejected the first two of these contentions, see *Drake Bakeries* v. *Local 50, American Bakery & Confectionery Workers*, 370 U. S. 254, 82 S. Ct. 1346 (1962), and the company has abandoned them on appeal. Now the company's sole argument on this issue is that the strike constituted an election of remedies.

bars arbitration. Moreover, while the decision to strike may have amounted to a determination by the union to use one of several alternative methods available to it for resolving its dispute with the company, it most certainly did not constitute an election between two available judicial remedies.

The company also contends that, inasmuch as the Board's issuance of the cease and desist order in 1958 necessarily required a decision that the parties' collective bargaining agreement did not prohibit the contracting out of the disputed work, see *NLRB* v. *Radio and Television Broadcast Engineers Union*, 364 U. S. 573, 577 n. 12, 81 S. Ct. 330, 333 (1961),[8] to order this grievance submitted to arbitration now would be to permit a collateral attack on a prior Board determination. This argument we cannot accept. Whatever may be the effect of a final Board adjudication of a Section 8(b)(4)(D) violation on an arbitrator's jurisdiction, it is clear that the cease and desist order issued in the instant case cannot bar arbitration of this grievance. As the court below noted, the issue of the contract right of the bargaining unit employees to the work assigned to the independent contractor was never fought out or decided in proceedings before the Board, and the Board expressly agreed, in the stipulation providing for the order designed to halt the strike, that the union was not relinquishing any claims that the company's subcontracting of work breached the collective bargaining agreement. No more reason exists for refusing to order arbitration here than there does in the case where, although Board jurisdiction exists over conduct underlying a grievance, that jurisdiction has re-

[8] "[T]he Board has adopted the position that jurisdictional strikes in support of contract rights do not constitute violations of §8(b)(4)(D) despite the fact that the language of that section contains no provision for special treatment of such strikes."

mained wholly unexercised. *Carey* v. *Westinghouse Electric Corp.*, 375 U. S. 261, 84 S. Ct. 401 (1964); *Carey* v. *General Electric Co., supra*, at 508-511. See *Smith* v. *Evening News Ass'n*, 371 U. S. 195, 83 S. Ct. 267 (1962); *Local 174, Teamsters* v. *Lucas Flour Co.*, 369 U. S. 95, 82 S. Ct. 571 (1962); *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502, 82 S. Ct. 519 (1962).

To order this grievance submitted to arbitration is not to deny that consent orders represent as much an expression of Board policy as orders issued after full-dress litigation; nor is it to impinge upon the rule requiring Courts of Appeals to enforce consent orders as drawn, *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U. S. 318, 82 S. Ct. 344 (1961). The consent order in this case was directed toward strike activity, not the arbitration of this grievance, and the stipulation which accompanied it was designed to permit these parties to resolve their private differences as to the meaning of their bargaining agreement before some forum other than the Board. Whatever the Board's opinion as to the meaning of this contract which prompted it to proceed against the strikers at Bridgeport, it is clear that the Board was content to effect what it regarded as proper labor policy by merely halting the strike with a consent order accompanied by a reservation. Such an order is entitled to judicial enforcement as drawn, but it is the order which is entitled to enforcement and not a contract interpretation which prompted the proceedings which have spawned the order.

Affirmed.

LUMBARD, *Chief Judge* (dissenting):

I dissent.

It is the duty of the courts to interpret the arbitration provisions of collective bargaining agreements according

to the intention of the parties as they have expressed it and in light of the circumstances surrounding the negotiations between the parties and the execution of the agreement. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U. S. 574, 584-85 (1960); *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238, 241-42 (1962).

The Supreme Court has admonished us that in the absence of an express provision excluding from arbitration a particular grievance, "only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *United Steelworkers of America v. Warrior & Gulf Navigation Co., supra,* at 585. I believe that General Electric has adduced such forceful evidence that its right to subcontract work was not subject to the general arbitration clause embodied in the collective bargaining agreement.

The agreement contains no express provision with respect to subcontracting. However, Part Four of the 1955-60 Settlement Agreement provides that the agreement is "intended to be and shall be in full settlement of all issues which were, or which the Union, the Locals, or the Company had by law the right to make, the subject of collective bargaining in negotiations between them preceding the execution of this Agreement." These words gather meaning from the context of the negotiations which immediately preceded the execution of the agreement. During the negotiations in 1954 the union presented to management a series of demands, among them a demand that the company "cease the farming out of work which could be done in GE plants." The company rejected this demand, and no contractual provision relating to subcontracting was included in the agreement.

That the union itself recognized that the issue of subcontracting had been excluded from the collective bargain-

ing agreement is apparent from the events that followed. The Settlement Agreement provided for a reopener in 1958 to discuss "proposals for contracting with regard to any question directly relating to employment security which may be submitted by either the Union or the Company." In 1958 the union in fact proposed alterations in the bargaining agreement, in light of its objection to the company's "subcontracting work that properly belongs in the bargaining unit." The union argued that "This provision should be incorporated in our agreement and the manner in which subcontracting may be carried on should be spelled out." The company rejected this demand, and the agreement was left intact in this regard. Again in 1960 the union sought to have incorporated in the bargaining agreement a provision concerning subcontracting, and once again the company rejected this demand.

All of these facts taken together lead me to the conclusion that there was no agreement to arbitrate any dispute arising out of the company's subcontracting for plant expansion work.

The company's reasons for refusing to agree to arbitration regarding subcontracting are quite apparent from the events which triggered this dispute. Much of the work to be performed in the renovation and remodelling of the plant and the installation of new machinery, estimated to cost $1,750,000, could not be done by General Electric employees. When the company suggested to its subcontractor, Gellatly Construction Company, that General Electric workers might do some of the work, Gellatly pointed out that this was practically impossible inasmuch as its employees were members of a rival union and would not work alongside of members of the International. Under the majority's decision, General Electric cannot safely subcontract with anyone not in its employ to do anything unless it first secures

the consent of the union or is willing to submit to the uncertainties of arbitration in an area normally left entirely to management. While the company might, of course, have agreed to this strait-jacket, it seems absurd to suppose that either the union or the company could think it had done so in light of its persistent refusal to accept the union's demand that it do so.

Surely the parties did not agree to arbitrate every conceivable claim. But by the reasoning of the majority we are pretty close to the point of holding that every claim must be arbitrated because at the very least it involves the question whether by some process of reasoning the claim may involve tangentially some provision in the agreement. We do a grave disservice to the salutary cause of arbitration when we compel a company to arbitrate under such circumstances. We defeat our national labor policy when we leave to management as its sole source of self-protection against arbitration of all disputes insistence upon the recital in the bargaining agreement of a multitude of matters which are not to be arbitrated, or, more likely, refusal to agree to arbitration about anything lest it unwittingly be required to arbitrate everything. With unions constantly seeking the inclusion of more matters in their written labor agreements, the majority ruling would seem to open up a one-way street for the benefit of the union. In my view, where there is no persuasive reason to believe that the parties could have thought that certain matters might in the future be the subject of arbitration under the terms of an agreement then governing their relations, we should hold that there was no agreement to arbitrate.

It is not our proper business to rewrite a labor agreement which is the result of long and hard-fought negotiations between management and labor. It is as much our

duty, after careful scrutiny of the agreement, to reject arbitration where the parties never intended it to be applicable as it is to require arbitration where the parties have seen fit to provide for this form of adjudication. The record here establishes that arbitration of disputes regarding subcontracting was never intended by the parties.

I would reverse the judgment of the district court and grant the company's motion for summary judgment.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-sixth day of May one thousand nine hundred and sixty-four.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge,*
HON. STERRY R. WATERMAN,
HON. THURGOOD MARSHALL,
Circuit Judges.

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS OF AMERICA, AFL-CIO,

Plaintiff-Appellee,

v.

GENERAL ELECTRIC COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

A. DANIEL FUSARO
Clerk